IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARRY R. FETTEROLF,	:	CIVIL ACTION
PLAINTIFF	:	NO. 01-1112
	:	
v.	:	
	:	
	:	
HARCOURT GENERAL, INC.,	:	
T/A HARCOURT COLLEGE	:	
PUBLISHERS,	:	
HARCOURT COLLEGE PUBLISHING,	:	
SCIENCE AND MATH GROUP,	:	
DEFENDANTS	:	

Giles, C.J. December , 2001

MEMORANDUM

I. Introduction

Barry Fetterolf brings this suit for **breach of contract and breach of the implied covenant of good faith and fair dealing** against Harcourt General, Inc., Harcourt College Publishers, and Harcourt College Publishing Science and Math Group (collectively "defendants"). Before the court are cross motions for summary judgment. For the reasons that follow, the motions are denied.

II. Factual Background

The relevant facts follow. In 1993, while serving as Vice-President and Editor-in-Chief of the Social Sciences Division of publisher McGraw-Hill, Fetterolf was hired to be the Editor-in-Chief of Saunders College Publishing, now known as Harcourt College Publishing ("HCP"). (**Mem. of Law in Supp. of** Pl.'s Mot. for Summ. J. at 2-3.) Carl Tyson, the President of HCP, and Elizabeth Widdicombe, the Vice-President of HCP, were defendants' representatives in the employment negotiations with Fetterolf. (Id.)

Widdicombe wrote Fetterolf a letter, dated June 8, 1993, in which she told him that she hoped the writing was "the complete version of our commitments to you as the new V.P., Editor-in-Chief...combining those [commitments] outlined in my letter to you of June 1st and those in Carl's handwritten letter of this morning." (**Mem. of Law in Supp. of** Pl.'s Mot. for Summ. J. Ex. 3.) The June 8th letter outlined Fetterolf's salary, bonus, "two year guaranteed employment agreement,"[1] and benefits at HCP. (Id.)

Tyson allegedly gave Fetterolf a handwritten letter, dated June 9, 1993, marked "confidential," which purported to offer a "confidential severance agreement" of two years pay if any of the following triggering events occured: (1) Fetterolf were dismissed for any reason other than cause; (2) HCP's office were moved from Philadelphia during the first five years of his employment unless he initiated the move; or (3) Fetterolf resigned following Tyson's departure from HCP. (**Mem. of Law in Supp. of** Pl.'s Mot. for Summ. J. Ex. 4.) Fetterolf alleges that the letters together constitute his employment agreement with HCP. (Id. at 4.)

In 1995 Tyson resigned as President of HCP to become President of UOL Publishing, Inc. ("UOL"). Fetterolf resigned from HCP nine months later to accept a position with UOL. (**Mem. of Law in Supp. of** Def.'s Mot. for Summ. J. at 2.) In his notice of resignation, dated August 14, 1996, Fetterolf requested payment of two years' salary, citing the severance option of his alleged employment contract. (**Mem. of Law in Supp. of** Def.'s Mot. for Summ. J. Ex. 4.) Ted Buchholz, Tyson's successor as President of HCP, concluded that HCP did not owe Fetterolf any severance since the only severance agreement in his official personnel file was the clause in the

[1] The two year guaranteed employment agreement states that if during the first two years you [Fetterolf] are dismissed for anything other than cause, you will receive two years salary as severance.

June 8th letter that provided severance only if there were dismissal without cause. (Def.'s Mem. in Opp. to Pl.'s Mot. for Summ. J. at 3.)

On June 1, 2001, Fetterolf sent a second letter to HCP requesting two years' salary and included a copy of the June 9th handwritten note from Tyson. Defendants claim that this was the first time they had seen the June 9th letter since it was not in Fetterolf's personnel file. (Id.) Defendants refuse to pay.

Fetterolf filed this action in state court on February 7, 2001 for breach of contract and breach of the implied covenant of good faith and fair dealing. Defendants removed the action to federal court on March 7, 2001. Cross-motions for summary judgment, filed on November 14, 2001, are presently before the court.

Fetterolf argues that defendants cannot present evidence that raises any issue of material fact relating to breach of his employment agreement and, therefore, he is entitled to judgment as a matter of law. (Mem. of Law in Supp. of Pl.'s Mot. for Summ. J. at 2.) Defendants argue that they are entitled to judgment as a matter of law because: (1) Fetterolf's state law claims for severance pay relate to an employee benefit plan and are preempted by the Employee Retirement Security Act ("ERISA"); (2) Fetterolf fully mitigated his losses and is not entitled to recover any damages; and (3) the alleged severance agreement constitutes an unenforceable penalty. (Mem. of Law in Supp. of Def.'s Mot. for Summ. J. at 1.)

III. Discussion

A. Standard for Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure provides that a court should grant summary judgment "...if the pleadings, depositions, answers to interrogatories, and admissions

on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). In making this determination, the court must draw the inferences from the underlying facts in the light most favorable to the party opposing the motion. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986). This court's role is to determine "whether there is a genuine issue for trial" and not to weigh the evidence and make credibility determinations. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Josey v. John R. Hollingworth Corp., 996 F.2d 632, 637 (3d Cir.1993).

B. ERISA Preemption[2]

The court has to decide whether plaintiff's claim is properly before this court as a breach of contract claim or whether plaintiff's claim is preempted by ERISA. Defendants argue that, assuming Tyson's June 9, 1993 letter is valid and enforceable, it constitutes an ERISA benefit plan and, therefore, plaintiff's breach of contract claim is preempted by ERISA. (Mem. of Law

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[2] Defendants argue that even if plaintiff's claims are not preempted by ERISA, "Fetterolf is not entitled to recover any damages, because he has fully mitigated his losses and because the alleged severance agreement constitutes an unenforceable penalty." (Mem. of Law in Supp. of Def.'s Mot. for Summ. J. at 1.) Defendants cite no authority for the proposition that plaintiff had a duty to mitigate his losses in regard to defendants' alleged breach of a contract to pay plaintiff two years' salary, when the severance provision did not mention a duty to mitigate. Thus, defendants are not entitled to summary judgment on the damages issue.

Further, whether the alleged severance agreement between the parties is an unenforceable penalty is an issue of fact for the jury. The third circuit has found that a severance pay provision is the functional equivalent of a liquidated damages clause. See Hennessy v. FDIC, 58 F.3d 908, 921 (3d Cir. 1995). Under Pennsylvania law, liquidated damage provisions are enforceable provided that, at the time the parties enter into the contract, the sum agreed to constitutes a reasonable approximation of the expected losses rather then an unlawful penalty. See Brinich v. Jencka, 757 A.2d 388, 402 (Pa. Super. Ct. 2000) (citing Carlos R. Leffer, Inc. v. Hutter, 696 A.2d 157, 162 (Pa. Super. Ct. 1997)). The reasonableness, and thus the enforceability of the alleged severance provisions, is a question of fact for the jury.

in Supp. of Pl.'s Mot. for Summ. J. Ex.4.) Section 514(a), the ERISA preemption provision, provides that "the provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a).

Fetterolf's alleged severance agreement, as outlined in Widdicombe's June 8, 1993 letter and Tyson's June 9, 1993 letter, does not qualify as an ERISA plan. Severance benefits implicate ERISA only if they require the establishment of an ongoing and separate administrative scheme to provide benefits. See Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 11-12 (1987). In Fort Halifax, the Court found that "[t]he requirement of a one-time, lump-sum payment triggered by a single event requires no administrative scheme whatsoever to meet the employer's obligation...To do little more than write a check hardly constitutes the operation of a benefit plan." Id. at 12.

"A plan, fund or program under ERISA is established if from the surrounding circumstances a reasonable person can ascertain intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." Deibler v. United Food and Commercial Worker's Local Union 23, 973 F.2d 206, 209 (3d Cir. 1992) (quoting Donovan v. Dillingham, 688 F.2d 1367, 1373 (11th Cir. 1982)). There is no evidence that a reasonable person could determine a class of beneficiaries or the procedures for receiving benefits based on plaintiff's alleged severance plan. Fetterolf stated in his deposition that he knew of no other employee who had a similar severance plan agreement and, indeed, there is no evidence that any employee at HCP had a similar severance agreement or that there was any procedure in place to

provide such benefits. (Dep. 9/21/01 at 103.)[3]

Fetterolf's alleged severance agreement is precisely the type of "theoretical possibility of a one-time obligation in the future" which Fort Halifax held "creates no need for an ongoing administrative program for processing claims and paying benefits." 482 U.S. at 12. Resolving all inferences in favor of the non-moving party, defendants would only have to write a single lump-sum check for two years' salary in the event any of the following triggering events: (1) dismissal for any reason other than cause or resignation; (2) movement of HCP's office from Philadelphia during the first five years of Fetterolf's employment unless Fetterolf initiated the move; (3) Tyson left HCP and Fetterolf resigned. (Mem. of Law in Supp. of Pl.'s Mot. for Summ J. Ex. 4.) Therefore, Tyson's severance benefits do not implicate ERISA and the breach of contract claim is properly before this court.

C. Triable Issues of Material Fact[4]

The respective motions for summary judgment must be denied because there are multiple issues of material fact. FED. R. CIV. P. 56(c).

1. Tyson's Authority to Give Fetterolf the Severance Agreement

Issues surrounding the validity of the June 9, 1993 handwritten letter, for example, whether Tyson had the actual or apparent authority to bind defendants to the disputed severance clause in the letter to Fetterolf, constitute material issues of fact that must be decided by a jury. Under Pennsylvania law a corporation is a legal fiction that can act only by creating agency relationships

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[3] Plaintiff Fetterolf's Deposition is provided in Mem. of Law in Supp. of Pl.'s Mot. for Summ. J. Ex.1.

[4] The court dispenses with a discussion of all material issues of triable fact.

with its officers, directors, employees, and others. See Richardson v. John F. Kennedy Mem. Hosp., 838 F. Supp. 979, 985 (E.D. Pa. 1993) (citing Biller v. Ziegler, 593 A.2d 436, 439 (Pa. Super. Ct. 1991)). An agent can bind his principal only if the agent has actual or apparent authority. See Volunteer Fire Co. of New Buffalo v. Hilltop Oil Co., 602 A.2d 1348, 1351-52 (Pa. Super. Ct. 1992). Actual authority can be express, directly granted by the principal to bind the principal as to certain matters, or implied, bind the principal to those acts of the agent that are necessary, proper and usual in the exercise of the agent's express authority. See id. at 1352. Apparent authority exists where the principal, by words or conduct, leads people with whom the alleged agent deals to believe that the principal has granted the agent the authority he purports to exercise. See id. at 1353.

Defendants cite the affidavit of Buchholz, Tyson's successor as President of HCP, to argue that Tyson did not have the actual authority to offer Fetterolf the handwritten, "confidential severance agreement" since the President of HCP "would certainly have been required to obtain approval from the legal department and from his superior." (Def.'s Mem. in Opp. to Pl.'s Mot. for Summ. J. at 4 & Buchholz Aff. Ex. 6.) Issues of fact as to actual authority, such as exist in this case, preclude summary judgment since a corporation's agency relationships with its officers, director, or employees are questions of fact for the jury. See Volunteer Fire Co., 602 A.2d at 1351.

Defendants also dispute the contention that Tyson possessed apparent authority since Fetterolf did nothing to ascertain Tyson's authority to give him the severance agreement in the June 9, 1993 letter. (Def.'s Mem. in Opp. to Pl.'s Mot. for Summ. J. at 11.) "The test for determining whether an agent possesses apparent authority is whether 'a man of ordinary prudence, diligence and discretion would have a right to believe and would actually believe that the agent

possessed the authority he purported to exercise.' " See Browne v. Maxfield, 663 F. Supp. 1193, 1199-1200 (E.D. Pa. 1987); Apex Financial Corp. v. Decker, 369 A.2d 483, 485-86 (1976). There is a material issue of fact whether Fetterolf reasonably believed that Tyson had authority to grant him the severance agreement that is claimed to be valid.

2. *The Authenticity of the June 9, 1993 Handwritten Note*

Defendants argue that the June 9, 1993 Tyson note was created with fraudulent intent and thus, is not an enforceable agreement. (Def.'s Mem. in Opp. to Pl.'s Mot. for Summ. J. at 12.) The legitimacy of a contract, specifically the intent of the parties to an agreement, is an issue of fact for the jury. See Murphy v. Duquesne University of the Holy Ghost, 777 A.2d 418, 429-31 (Pa. 2001).

3. Whether the June 9, 1993 Letter is Part of Plaintiff's Employment Agreement

The June 8, 1993 letter from Widdicombe to Fetterolf states that she hopes this letter is "the complete version of our commitments to you" and that the June 8, 1993 letter combines the commitments "outlined in my letter to you of June 1st and those in Carl's [Tyson's] handwritten letter of this morning." (Mem. of Law in Supp. of Pl.'s Mot. for Summ. J. Ex. 3.) Widdicombe has explained in a statement that the reference to "Carl's handwritten letter" was to a piece of paper that Tyson had given her on June 8, 1993, and not to the handwritten letter dated June 9, 1993, as Fetterolf claims. (Def.'s Mem. in Opp. to Pl.'s Mot. for Summ. J. Ex. 11 ¶ 7.) The task of construing ambiguous contract terms is one for the fact finder. See Murphy, 777 A.2d at 429-430. Thus, there is an issue of material fact for the jury whether plaintiff's employment agreement between the parties consisted of (1) only the June 8, 1993 letter or (2) the June 8, 1993 letter incorporating the handwritten letter dated June 9, 1993.

IV. CONCLUSION

For the above reasons, the cross-motions for summary judgment are denied. An appropriate order follows.

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HARCOURT GENERAL, INC.,	:	
T/A HARCOURT COLLEGE	:	
PUBLISHERS,	:	
HARCOURT COLLEGE PUBLISHING,	:	
SCIENCE AND MATH GROUP,	:	
DEFENDANTS	:	

ORDER

AND NOW, this ___ day of December 2001, upon consideration of Plaintiff's Motion for Summary Judgement, Defendant's Motion for Summary Judgment, and the responses thereto, it is hereby ORDERED that the motions are DENIED.

BY THE COURT

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JAMES T. GILES C.J.